Supreme Court, U.S.
FILED
JUN 12 1991
OFFICE OF THE CLERK

(2)

No. 90-1755

In The

Supreme Court of the United States

October Term, 1990

RABEN-PASTEL, a Joint Venture,
comprised of RABEN BUILDERS, INC.
and PASTAL CONSTRUCTION COMPANY,

Petitioners,

v.

CITY OF COCONUT CREEK, a Florida
Municipal Corporation, and JAMES COWLEY

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF RABEN-PASTAL, et al., FOR WRIT OF CERTIORARI

ROBERT H. SCHWARTZ
GUNTHER & WHITAKER, P.A.
Attorneys for Respondents
Post Office Box 14608
Fort Lauderdale, Florida 33302
(305) 523-5885

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF THE QUESTION PRESENTED

WHETHER THE SUPREME COURT OF FLORIDA PROPERLY DETERMINED THAT MUNICIPAL LIABILITY DOES NOT ATTACH TO THE ACTS OF ITS CHIEF BUILDING OFFICIAL WHERE AS A MATTER OF STATE LAW THE MUNICIPAL CHIEF BUILDING OFFICIAL IS NOT THE FINAL POLICYMAKING AUTHORITY?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT FOR DENYING THE PETITION..... 3

TABLE OF AUTHORITIES

Page

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).....3, 4, 5, 6

Howell v. Evans, 922 F.2d 712 (11th Cir. 1991)..... 6

Jett v. Dallas Independent School District, 485 U.S. 112, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).....3, 5

Manor Healthcare Corp. v. Lomelo, 929 F.2d 633 (11th Cir. 1991) 6

Williams v. Butler, 863 F.2d 1398 (8th Cir. 1988)..... 5

Worsham v. City of Pasadena, 881 F.2d 1356 (5th Cir. 1989)..... 6

STATEMENT OF THE CASE

Because of the justified concerns relating to the safety of two (2) buildings under construction in the City of Coconut Creek, Florida, James Cowley, the Chief Building Inspector for the City, issued a stop work order.

The stop work order was issued pursuant to the South Florida Building Code which by legislative enactment is part of the laws of the State of Florida and is applicable to all the municipalities in Broward County, Florida. As the City of Coconut Creek is a municipality within Broward County, this condominium development project was subject to the provisions of the South Florida Building Code.

During the pendency of the stop work order two (2) issues arose that brought into question the propriety of the continuation of the stop work order. The first related to whether an engineer who had previously been involved in the project could act as a "special inspector" pursuant to § 305 of the Code. Cowley's concern that this created a serious conflict of interest resulted in the filing of an appeal with the Board of Rules and Appeals pursuant to the administrative review procedure incorporated into the South Florida Building Code. Petitioners also filed a petition for writ of mandamus in the Circuit Court of Broward County. The Board of Rules and Appeals met on July 20, 1981 and denied petitioners' appeal. (R. 1708-1740). Rather than availing themselves of the appeal provisions contained within the South Florida Building Code, the petitioners chose to pursue the mandamus action. When the petition for writ of mandamus was denied, no appeal was taken.

A second appeal to the Board of Rules and Appeals resulted from a controversy that arose following an agreement that load tests would be conducted on the buildings to insure that the previously discovered problems had been remedied. Following a satisfactory result from the first load test petitioners sought to avoid the second load test and when Cowley insisted that the second test was necessary another appeal was filed. This appeal was heard on November 12, 1981 at which time the Board of Rules and Appeals again denied the appeal. (Joint Plaintiffs' Exhibits 1A, 1B and 2). Again the petitioners failed to pursue the judicial review procedure provided by the Code, and upon successful completion of the load test the stop work orders were lifted and construction resumed.

Following a jury verdict in favor of the petitioners against the City and Cowley, the trial court granted the defendants' renewed motion for directed verdict. (R. 2063).

The appeal that followed resulted in an affirmance by the intermediate appellate court, but upon motion for rehearing that court (the Fourth District Court of Appeal) certified the following question to the Florida Supreme Court:

> May a municipality be held liable to an owner-developer of a building project under 42 U.S.C. §1983 for the wrongful refusal of the municipality's chief building official to withdraw a stop work order on the project?
>
> (A-37)

The Florida Supreme Court answered the certified question as to this case in the negative. (A-18). It is from

the adverse decision on this issue that the petition is based.

SUMMARY OF ARGUMENT

Despite the characterization of the questions presented for review by the petitioners, this petition seeks to have this Court reject a determination by the Florida Supreme Court on a question of state law. This is directly contrary to the case law in which this Court has made it repeatedly and abundantly clear that the issue whether a particular official has final policymaking authority for purposes of determining municipal liability pursuant to 42 U.S.C. §1983 is a question of state law.

What the petition seeks is to have this Court apply the long rejected doctrine of *respondeat superior* to the City of Coconut Creek.

The issue of individual liability is in reality an afterthought as it was not discussed by the Fourth District Court of Appeal and consideration of it was expressly rejected by the Florida Supreme Court. (A-18, n.6).

ARGUMENT FOR DENYING THE PETITION

MUNICIPAL LIABILITY

Whether a particular official has final policymaking authority is a question of state law. The recent decisions of this Court in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion) and *Jett v. Dallas Independent School District*, 485 U.S. 112,

109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) authoritatively determined "where policymaking authority lies for purposes of § 1983" is "a question of *state law.*" *Id.* at 109 S.Ct. 2723. (Emphasis added).

The determination by the Florida Supreme Court that James Cowley did not possess final authority to establish municipal policy under Florida law was precisely what this Court contemplated its responsibility to be:

> Without attempting to canvass the numberless factual scenarios that may come to light in litigation, we can be confident that *state law (which may include valid local ordinances and regulations)* will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business. (emphasis supplied).

Praprotnik, supra, at 108 S.Ct. 924-925.

The *Praprotnik* plurality expressly rejected using state law as merely "an appropriate starting point" by adhering unmistakably to the premise that because of the inherent diversities of local government "the identification of the policymaking officials is not a question of federal law. . . . " *Id.* at 108 S.Ct. 924.

Any other approach would place municipalities in a position of sufficient uncertainty which "could easily lead to results that would be hard in practice to distinguish from the results of a regime governed by the doctrine of *respondeat superior.*" *Id.* at 108 S.Ct. 924, n.1.

The expressed confidence that state law will properly identify policymaking officials or bodies was satisfied by the considered approach taken by the Florida Supreme Court in carrying out its appointed task.

The Florida Supreme Court's analysis and conclusion are consistent with the mandate of *Praprotnik* and *Jett* and the suggestion that the decision creates a conflict ignores a careful reading of the respective opinions.[1]

Reliance on the cases cited by the petitioners from the federal courts of appeal on the issue of delegation of authority is misplaced. Application of the delegation theory of municipal liability in this case would amount to the application of the doctrine of *respondeat superior* to the City for the acts of its employees.

Incomplete delegation of authority with the right of review will not result in municipal liability. *Williams v. Butler*, 863 F.2d 1398, 1404 (8th Cir. 1988).

In *Manner Healthcare Corp. v. Lomelo*, 929 F.2d 633 (11th Cir. 1981), a grant of summary judgment in favor of the City of Sunrise, Florida on the issue of municipal liability was affirmed by the Eleventh Circuit Court of Appeals.

---

[1] Petitioners' failure to cite to *Jett* is perhaps significant. Were this Court to determine that Cowley was the final policymaker, the Court would then have to confront the remand situation presented in *Jett*, as the question of final policymaking authority was in this case, as in *Jett*, submitted to the jury. (R. 1872-1873). Surely the expertise of the Supreme Court of Florida is equal to that of the United States Court of Appeal in determining the status of state law. *Jett, supra*, at 109 S.Ct. 2724.

The distinction between the *Jett* situation and the case at bar is the deference to the determination of state law which has already occurred herein.

The district judge's determination that John Lomelo, as mayor of the City of Sunrise, was not under Florida law the final policymaker. This determination was made despite proof that "Lomelo's de facto powers caused the city council to defer in substantial part to his judgment." *Id.* at 637-638.

The district judge determined that as the city charter gave the city council the power to override his veto on zoning matters, he was not under the charter the ultimate policymaking authority on zoning matters under state law. *See also Howell v. Evans*, 922 F.2d 712, 724-725 (11th Cir. 1991); *Worsham v. City of Pasadena*, 881 F.2d 1356 (5th Cir. 1989).

Just as the Sunrise City Charter precluded Mayor Lomelo from being the final policymaker in Sunrise, the South Florida Building Code as codified by the Florida Legislature precluded James Cowley from being the final policymaker in the adjacent City of Coconut Creek. The delegation of power and city council deference arguments advanced by petitioners herein were expressly rejected by the Court in *Manor Healthcare, supra*, at 638.

As the court held in *Lomelo*; "[t]o hold the city liable for Lomelo's actions would in essence subject the city to vicarious liability for Lomelo's personal acts. *Monell* and its progeny prohibit us from so doing." *Id.* at 638; *Praprotnik, supra*, at 108 S.Ct. 924, n.1.

The Florida Supreme Court properly held that James Cowley was not the final policymaker as the South Florida Building Code precluded him from possessing "final authority to establish municipal policy." (A-18). Therefore, municipal liability cannot result from his actions.

INDIVIDUAL LIABILITY

The issue of Cowley's individual liability was not part of the question certified to the Florida Supreme Court and consideration of that and other ancillary issues were expressly rejected by the court. (A-18, n.6).

There is no reason for this Court to deal with this issue as it was not actively litigated in the Florida District Court of Appeal and was expressly rejected as an issue by the Florida Supreme Court. (A-18, n.6.). Not every ancillary issue raised by the parties should be considered by this Court.

CONCLUSION

Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

By /s/ Robert H. Schwartz
ROBERT H. SCHWARTZ
GUNTHER & WHITAKER, P.A.
Attorneys for Respondents
Post Office Box 14608
Fort Lauderdale, Florida 33302
(305) 523-5885